APR 3 1974

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-1493

CAROLYN G. HOWARD, Respondent,

versus

DONALD L. ALLEN, Petitioner

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

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IN THE

# Supreme Court of the United States

October Term, 1973

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No. .....

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CAROLYN G. HOWARD, RESPONDENT,

*versus*

DONALD L. ALLEN, PETITIONER

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## PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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Donald L. Allen respectfully petitions the Supreme Court of the United States for allowance of a Writ of *Certiorari* to review the *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit in this case filed December 13, 1973.[1]

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit does not appear to be reported. A copy of the same is included in the Appendix hereto at page 29, together with the order of said Court denying Petition for Rehearing.

The Opinion of the United States District Court for the District of South Carolina does not appear to be reported. A copy of the same is in the Appendix at page 17.

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[1] Petition for Rehearing was denied by Order of the United States Court of Appeals for the Fourth Circuit filed January 15, 1974.

## JURISDICTION

The statute believed to confer on this Court jurisdiction to review the decision in question by writ of *certiorari* is set forth in 28 U. S. C. A. § 1254(1).

The decree which Petitioner seeks to review is a *per curiam* decision of the Court of Appeals for the Fourth Circuit dated December 13, 1973, filed the same day, together with order of said Court filed January 15, 1974, ordering that petition for rehearing be denied.

## QUESTIONS PRESENTED

1. May South Carolina's Long Arm Statute be applied retroactively by a Federal Court sitting in South Carolina to uphold jurisdiction in a diversity suit by a resident of South Carolina against an Ohio resident who allegedly committed a tort in South Carolina on February 23, 1967, although the statute provides that the Act shall become effective January 1, 1968, and "applies to transactions entered into and events occurring after that date"?

2. Does not the doctrine of *Erie R. Co. v. Tompkins* require that a federal district court sitting in South Carolina be governed by the statute law of South Carolina as set forth in its Long Arm Statute, if jurisdiction is predicated on such statute?

3. May a federal district court sitting in South Carolina apply a long arm statute retroactively, even though the highest court of South Carolina has held in an analogous case that a substituted service statute, when applied retroactively, is not merely a matter of procedure but substantially affects the rights of defendants?

4. Is there not a conflict between the Circuit Courts as to the retroactive application of substituted service statutes, which this Court should resolve?

## STATUTES INVOLVED

The South Carolina Long Arm Statute was enacted as a part of South Carolina's Uniform Commercial Code which is now set forth in Volume 2A of the 1962 Code of Laws of South Carolina, as amended. Part 8 of said statute entitled "Further Remedies" is as follows:

"§ 10.2-801. **Definitions.**—As used in this Title '*person*' includes an individual, his executor, administrator or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State. (1966 (54) 2716.)

"§ 10.2-802. **Personal jurisdiction based upon enduring relationship.**—A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action. (1966 (54) 2716.)

"§ 10.2-803. **Personal Jurisdiction based upon conduct.**—(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

"(a) transacting any business in this State;

"(b) contractng to supply services or things in this State;

"(c) commission of a tortious act in whole or in part in this State;

"(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered, in this State; or

"(e) having an interest in, using, or possessing real property in this State; or

"(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

"(g) entry into a contract to be performed in whole or in part by either party in this State; or

"(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

"(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 10-310 (3). (1966 (54) 2716.)

"§ 10.2-804. **Service outside the State.** When the exercise of personal jurisdiction is authorized by this section, service may be made outside the State. (1966 (54) 2716.)

"§ 10.2-805. **Other bases of jurisdiction unaffected.**—A court of this State may exercise jurisdiction on any other basis authorized by law. (1966 (54) 2716.)

"§ 10.2-806. **Manner and proof of service.**—(1) When the law of this State authorizes service outside this State, the service, when reasonably calculated to give actual notice, may be made:

"(a) by personal delivery in the manner prescribed for service within the State;

"(b) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;

"(c) by any form of mail addressed to the person to be served and requiring a signed receipt; or

"(d) as directed by the court.

"(2) Proof of service outside this State may be made by affidavit of the individual who made the service or in the manner prescribed by law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made pursuant to paragraph (c) of subsection (1) of this section, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. (1966 (54) 2716.)

"§ 10.2-807. **Individuals eligible to make service.**—Service outside this State may be made by an individual permitted to make service of process under the law of this State or under the law of the place in which the service is made or who is designated by a court of this State. (1966 (54) 2716.)

"§ 10.2-808. **Individuals to be served; special cases.**—When the law of this State requires that in order to effect service one or more designated individuals be served, service outside the State under this section must be made upon the designated individual or individuals. (1966 (54) 2716.)

"§ 10.2-809. **Other provisions of law unaffected.**—This Title does not repeal or modify any other law of this State permitting another procedure for service. (1966 (54) 2716.)"

The final section of the statute entitled "Commercial Code-Effective Date and Repealer" is now set forth in Sections 10.10-101 through 10.10-103, and reads as follows:

"§ 10.10-101. **Effective date.** This act shall become affective at 12:01 A. M., January 1, 1968. It applies to transactions entered into and events occurring after that date.

"§ 10.10-102. **Blank.**

"§ 10.10-103. **General Repealer.**—All acts and parts of acts inconsistent with this act are hereby repealed."

Part 8 of the Uniform Commercial Code entitled "Further Remedies" (which Petitioner has designated as South Carolina's Long Arm Statute), comprising Sections 10. 2-801 through 10.2-808 of the 1962 Code of Laws of South Carolina, as amended, was reenacted without change by 1972 Act No. 1343 of the South Carolina General Assembly (1972 (57) 2518.) with a preamble as follows:

> "Whereas, Part 8 of Article 2 of Act 1065 of 1966 was added to the act by amendment from the floor during its debate and passage in the General Assembly and the amendment was not reflected in the title of the act and has been held in the circuit courts of the State to be invalid because the amendment did not meet the requirements of Section 17 of Article III of the Constitution of this State which states 'Every act or resolution having the force of law shall relate to but one subject and that shall be expressed in the title'; and
>
> "Whereas, in order to make the provisions of Part 8 of Article 2 valid, the members of the General Assembly believe that Part 8 of Article 2 as reenacted herein shall cure any constitutional invalidity and that after passage of this act no constitutional question shall attach to the provisions thereof."[1]

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[1] In the District Court Plaintiff had also relied on a statute purporting to permit service of process on a non-resident aircraft operator, enacted in 1971, which is now included in the 1962 Code of Laws, as amended, as Sections 10-431.2 through 10-431.4. This statute reads as follows:

> "§ 10.431.2. Service on nonresident operators of aircraft.—Service of process upon the Director of the South Carolina Aeronautics Commission, as agent of the nonresident operator of any aircraft which has set down in South Carolina, shall be made by leaving a copy thereof, with a fee of four follars (sic), in the hands of the Director or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint and other papers in the cause. The Director shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Director, he shall deliver it to the plaintiff on request and keep a

## STATEMENT OF THE CASE

Petitioner is a resident of Ohio. In 1973, suit was filed against him by Plaintiff, a resident of South Carolina, in the United States District Court for the District of South Carolina and a Summons was served on him in Ohio. The Plaintiff also attempted service on Petitioner by mailing process to him as provided by Sections 10-431.2 and 10-431.3 of the 1962 Code of Laws of South Carolina, as amended, enacted 1971, permitting substituted service of process on a nonresident operator of an airplane.

In her suit Plaintiff seeks to recover for personal injuries sustained in February, 1967, when struck by a propeller of an aircraft on the ground at Greenville, South Carolina, alleging that the Defendant's negligence resulted in her injuries. Jurisdiction was based on diversity of citizenship (Section 1332 of the Judicial Code).

Petitioner's motion to dismiss the action for want of personal jurisdiction over him was denied by the United States District Court, District of South Carolina, by order dated June 7, 1973, which held that South Carolina's Long Arm Statute could be appied retroactively, but denied that the statute relating to service of aircraft operators (Sec-

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record showing the date of its receipt by him and its delivery to the plaintiff. (1971 (57) 132.)

"§ 10-431.3 **Same; when defendant does not receipt for notice sent by certified mail.**—If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned to the plaintiff or Director, the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant. (1971 (57) 132.)

"§ 10-431.4. **Same; §§ 10-431.2 and 10-431.3 not applicable to certain air carriers.**—The provisions of §§ 10-431.2 and 10-431.3 shall not apply to any incorporated air carrier holding a certificate of public convenience and necessity from the Civil Aeronautics Commission. (1971 (57) 132.)"

tions 10-431.2 through 10-431.4 of the Code) could be so applied.

On appeal by Petitioner, the Court of Appeals for the Fourth Circuit affirmed the District Court upholding jurisdiction over Petitioner on the basis of South Carolina's Long Arm Statute.[1] Petitioner contends that the Court of Appeals erred in so doing.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

There are two reasons why the petition for the Writ should be granted, namely:

(1) The Court of Appeals for the Fourth Circuit has failed to be governed by the statutes and case law of South Carolina.

(2) There is a conflict among the Courts of Appeal as to whether substituted service statutes may be applied retroactively in support of jurisdiction in a diversity case.

### (1) The Court of Appeals Did Not Follow The Statutes and Case Law of South Carolina

The brief opinion of the Court of Appeals affirmed a ruling of the District Court that South Carolina's Long Arm Statute, effective January 1, 1968, can be utilized to obtain jurisdiction over Petitioner whose alleged tortious act occurred before that date. The Court reasoned that, if faced with a similar case, the South Carolina Supreme Court would permit retroactive application of this statute. Appendix, Page 26.

Ignored in such holding was express statutory language making such Long Arm Statute applicable only to events occurring after January 1, 1968. It is Petitioner's

[1] The Court found it unnecessary to consider Plaintiff's cross assignment of error concerning non-application of the Statute purporting to permit service on a nonresident aircraft operator.

contention that the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 803, 82 L. Ed. 1188 (1938) will not permit the Court to invoke a portion of a state statute as the basis of jurisdiction and, at the same time, disregard the remainder of the statute which limits its applicability to events which take place after a stipulated date.

When Plaintiff was injured, Petitioner, as he does now, resided in Ohio and no South Carolina statute authorized suit against him in South Carolina with process being served on him in Ohio. South Carolina's Long Arm Statute, now Sections 10.2-801 through 10.2-809 of the 1962 Code of Laws of South Carolina, as amended, was enacted as part of South Carolina's Uniform Commercial Code, which became effective January 1, 1968, and expressly stated that the statute "applies to transactions entered into and events occurring after that date." Section 10.2-101 of the 1962 Code of Laws of South Carolina, as amended.

Erie R. Co. has not been so eroded as to permit a federal court to use a portion of a statute as a tool for upholding jurisdiction while at the same time ignoring express language of the statute limiting its applicability to events transpiring after a stipulated date.

In the absence of some contrary indication, we must assume that the authors of the statute in question intended to convey the ordinary meaning to the language they used. *Jones v. Liberty Glass Company,* 332 U. S. 524, 68 S. Ct. 229, 92 L. Ed. 142, (1947).[1]

In upholding jurisdiction, South Carolina's Long Arm Statute was characterized as a "remedial, procedural law" which, in the Court's view, may be applied retroactively. Appendix, Page 30. In so doing, and in predicting accept-

[1]. When the South Carolina General Assembly reenacted its Long Arm Statute in 1972 to cure attacks on its constitutionality, it was adopted without change as to its effective date. Act No. 1343 of the Acts and Joint Resolutions of South Carolina (1972); 1972 (57) 2518.

ability of such a holding by South Carolina's highest state court, the Court of Appeals also failed to heed important case law. While the South Carolina Supreme Court has not had occasion to consider retroactive application of its Long Arm Statute,[2] in an analogous case the Court refused to adopt the argument that the statute was merely remedial, and clearly declared that it "substantially" affected the rights of the defendants. *Johnson v. Baldwin,* 214 S.C. at 552, 53 S.E. 2d at 788.

Subsequently, the Supreme Court of South Carolina has cited *Johnson v. Baldwin* with approval in reiterating its disapproval of the retroactive approval of state statutes. *Schumacher v. Chapin,* 228 S.C. 77, 88 S.E. 2d 874 (1955). *Pulliam v. Doe,* 246 S.C. 106, 142 S.E. 2d 861 (1965).

Retroactive utilization of South Carolina's Long Arm Statute was not proper in view of the statutory language limiting its application to a date subsequent to Plaintiff's injury and the strong disapproval of retroactive application voiced in South Carolina case law.

### (2) There Is A Conflict Among Courts of Appeals As To Whether Substituted Service Statutes May Be Applied Retroactively

Although the wording of a particular statute may, in part at least, explain a specific result, it appears that the Courts of Appeal do not agree as to whether or not a statute subjecting a nonresident to the jurisdiction of a state court may be applied retroactively on the theory that it is merely "remedial" or "procedural."

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[2]. The South Carolina Supreme Court reportedly may have occasion to consider the validity of retroactive application of South Carolina's Long Arm Statute to events occurring after its effective date (January 1, 1968) and before its constitutional infirmaties were removed in 1972. Reportedly an appeal is now being perfected in the case of *Dorothy M. Thompson v. Carol Hofmann.*

Characterizing South Carolina's Long Arm Statute as a "remedial, procedural law", the Court of Appeals for the Fourth Circuit has ruled that such statute may be utilized to obtain service of process on a nonresident defendant whose alleged tortious act occurred before the statute was enacted.

On the other hand, the Court of Appeals for the Third Circuit in *Summers v. Skibs A/S Myken,* 296 F. 2d 548, in 1961 affirmed a District Court ruling refusing to retroactively apply the Pennsylvania Non-resident Vessel Owners Act to sustain jurisdiction in favor of a plaintiff who was injured before the statute was enacted. Citing the South Carolina case of *Johnson v. Baldwin, supra,* the Third Circuit concluded that substituted service statutes affect substantial rights, and are more than merely "procedural" or "remedial."

Likewise, in *Hasse v. American Photograph Corp.,* 299 F. 2d 666, the Tenth Circuit in 1962 reached a similar result in concluding that an amendment to Oklahoma's Long Arm statute should not be retroactively applied. The Court held that the amendment was not strictly procedural and could not have retroactive effect.

In reaching its decision, the Third Circuit followed state law (Pennsylvania Law) as did the Tenth Circuit (Oklahoma Law), while the Fourth Circuit seemingly ignored salient language of the South Carolina statute and analogous case law, predicting what the South Carolina Supreme Court might do.

While federal courts often must exercise their independent judgment in ascertaining state law, where no precedent exists, a relevant state statute cannot be disregarded as a mere procedural devise. *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

If recovery could not be had in a state court, it should be denied in a federal court. *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949).

And the expressions of the views of the judges of the state courts, who are familiar with the intracacies and trends of local law and practice, if not indispensable, are at least a highly desirable and important aid to the determination of state law in a federal court. *Huddleston v. Dwyer,* 322 U.S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246 (1944).

In a diversity case such as this, a federal court should be, in effect, only another court of the state. *Angel v. Bullington,* 330 U.S. 183, 67 S.Ct. 657, 91 L. Ed. 832 (1947).

## CONCLUSION

The basis for personal jurisdiction over a nonresident must be found in a statute or a procedural rule having the force of a statute. If a federal court relies on a state long arm statute as the basis of jurisdiction *in personam* it obviously must accept and be guided by all of the language of the statute including the words which limit its applicability to events occurring after a specified date. Such a statute may not be denominated as procedural and retroactively applied to events occurring before the specified date.

Here we are not dealing with mere "housekeeping rules" embodied in state law. *Cf. Hanna v. Plumer,* 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L. Ed. 2d 8, 18 (1965), but with the right of a federal court to exercise *in personam* jurisdiction over a nonresident. Unless Rule 4(e) of the Federal Rules of Procedure creates jurisdictional rights, which we doubt, the federal court must look to the state statute for the basis for and the limits of its power to assert jurisdiction over a nonresident.

Petitioner respectfully requests that this Honorable Court grant a writ of *certiorari* to review the validity or invalidity of the lower federal court's affirmation of jurisdiction.

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# APPENDIX

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## OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

### Civil Action No. 73-150

### ORDER

This matter comes before the court upon a motion by defendant Donald L. Allen to quash and set aside service of the Summons, and to dismiss this action for want of personal jurisdiction over Allen. The action arises out of a personal injury sustained by the plaintiff, Carolyn G. Howard when she was allegedly struck by the propeller of an aircraft, piloted by the defendant, while at the downtown airport in Greenville, South Carolina. At the time of the incident, defendant was and at present is a resident of Ohio; plaintiff was and is a resident of South Carolina, the amount in controversy is asserted to be in excess of Ten Thousand ($10,000.00) Dollars. The requisites of diversity jurisdiction exist *prima facie*.[1]

Defendant's motion to quash/dismiss is based on the grounds that:

(1) Defendant has not been properly served with process in accordance with any applicable statute.

(2) The accident complained of occurred on or about February 24, 1967, and the statute purporting to permit substituted service on defendant did not become effective until March 31, 1971, and may properly be applied prospectively only, the statute not being one of which it enacted or intended to be applied retroactively.

(3) Any attempt to apply the 1971 statute retroactively to a 1967 accident violates the defendant's constitutional rights, particularly the due process clause of the Federal Constitution.

(4) Any attempted exercise of personal jurisdiction over defendant, an Ohio resident, in the District of South Carolina is unconstitutional in that defendant did not have the necessary minimal contacts to satisfy the requirements of due process under the Federal Constitution.

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[1] 28 U. S. C. 1332.

(5) Personal jurisdiction over defendant may not be predicated on the alleged commission of a single tort in South Carolina in February, 1967, at which time there was no statute which would have made the defendant subject to suit in South Carolina.

Preliminary to a detailed consideration of defendant's grounds, it is appropriate to examine the applicable statutes upon which plaintiff relies for jurisdiction and which defendant contends fall short of conferring jurisdiction. The first of these is Section 10.431.2, S. C. Code Ann. (Supp. 1971), which provides:

> § 10-431.2. Service on nonresident operators of aircraft.—Service of process upon the Director of the South Carolina Aeronautics Commission, as agent of the nonresident operator of any aircraft which has set down in South Carolina, shall be made by leaving a copy thereof, with a fee of four dollars, in the hands of the Director or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail *by the plaintiff*, "OR the Director" to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint and other papers in the cause. The Director shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Director, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

An integral part of this section is § 10.431.3 [2] which establishes the procedures to be followed when a defendant on

[2] Section 10-431.3, S. C. Code 1962 Anno. provides:

When defendant does not receipt for notice sent by certified mail.—If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned to the plaintiff or Director, the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such

whom service is sought under § 10.431.2 does not receipt for notice sent by certified mail. In all essential respects, these sections are identical to or correspond so closely as to appear identical in purpose, to §§ 10.431 and 10.431.1,[3] S. C. Code Anno. (1971 Supp.) respectively, relating to service of process on nonresident motor vehicle drivers.

The second of these statutes is § 10.2-801, *et seq.*, South Carolina Code Ann. (1962) (1966 Added Volume), the so-called "Long Arm Statute." Originally enacted as a part of the South Carolina Uniform Commercial Code, which became effective January 1, 1968, these sections were re-enacted effective June 2, 1972, in order to cure certain con-

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open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant.

[3] Section 10-431, S. C. Code 1962 Anno. provides:

Service on nonresident motor vehicle drivers and motor carriers.—Service of process upon the Chief Highway Commissioner, as agent of (a) a nonresident driver under the provisions of § 46-104; (b) a resident driver who subsequently becomes a nonresident; (c) a nonresident motor carrier under the provisions of Title 65, chapter 15 (§ 65-1231 *et seq.*); or (d) nonresident unregulated motor carriers engaged in transporting persons, hauling farm or dairy products, hauling any other perishable products or haulers of lumber or logs, shall be made by leaving a copy thereof, with a fee of four dollars, in the hands of the Commissioner or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Commissioner to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint and other papers in the cause. The Commissioner shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Commissioner, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

Section 10-431.1 provides:

When defendant does not receipt for notice sent by certified mail.—If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned to the plaintiff or the motor vehicle division of the State Highway Department, the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant.

stitutional (South Carolina) infirmities. Specifically, these sections were relegislated to conform with the notice requirement of Section 17 of Article III [4] of the Constitution of South Carolina.

The specific portions of § 10.2-801, *et seq.* here relied on by the plaintiff to confer personal jurisdiction upon this court specify:

> § 10.2-803. Personal jurisdiction based upon conduct.—(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
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> • • •
>
> (c) commission of a tortious act in whole or in part in this State;
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> § 10.2-804. Service outside the State.—When the exercise of personal jurisdiction is authorized by this section, service may be made outside the State.
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> § 10.2-806. Manner and proof of service.—(1) When the law of this State authorizes service outside this State, the service, when reasonably calculated to give actual notice, may be made:
>
> (a) by personal delivery in the manner prescribed for service within the State;
>
> (b) In the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;
>
> (c) by any form of mail addressed to the person to be served and requiring a signed receipt or
>
> (d) as directed by the court.
>
> (2) Proof of service outside this State may be made by affidavit of the individual who made the service or in the manner prescribed by law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made for proof

[4] Article III, Section 17, South Carolina Constitution (1895) provides:

> One subject.—Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.

of service in an action in any of its courts of general jurisdiction. When service is made pursuant to paragraph (c) of subsection (1) of this section, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

§ 10.2-807. Individuals eligible to make service.—Service outside this State may be made by an individual permitted to make service of process under the law of this State or under the law of the place in which the service is made or who is designated by a court of this State.

## SERVICE OF PROCESS

From the record it appears that service of process upon defendant was accomplished by proceeding under both of the aforementioned statutes, that is: (1) by service upon the Director of the South Carolina Aeronautics Commission with attempted notice to the defendant by certified mail as provided by § 10-431.2,[5] and failing in an attempt to obtain a receipt for the certified mail by properly complying with the alternative procedure of § 10-431.3 of using regular mail to accomplish service; and (2) by personal service of a summons upon the defendant in Ohio by a United States Marshal (only after the expenditure of considerable effort and numerous attempts) on April 23, 1973, thereby complying with §§ 10.2-806, 807 of the Code of Laws of South Carolina. The defendant's first ground is thereby without merit.

[5] Affidavits submitted by the Director, South Carolina Aeronautics Commission and his secretary indicate that at least four (4) attempts at service upon defendant by certified mail were made unsuccessfully at various addresses, both residential and business, and that one of the envelopes sent to a business address had been opened by an unknown person and then returned marked "No longer here—Return to Sender."

## RETROACTIVE APPLICATION OF STATUTES

The basic question before the court is whether or not the two statutes relied on by plaintiff to confer jurisdiction upon this court may be applied retroactively. It is conceded by plaintiff that neither of the statutes in question was in effect at the time of the accident. Because of clear distinctions between the two statutes it is deemed advisable by the court to consider them separately. A general rule of construction concededly applicable to both statutes however, is that in general statutes are to be construed as acting prospectively unless there is a specific provision or clear legislative intent to the contrary.

(a) § 10.431.2 *Service on nonresident operators of aircraft.*

As previously noted, this statute is very similar to § 10-431 providing for service on nonresident motor vehicle operators. Of particular importance in this regard is that, in both instances, the statutes provide for service upon a state official; in the case of § 10-431.2 the Director of the South Carolina Aeronautics Commission, "as agent of the nonresident operator." It is this "fiction of implied consent" which sets this type of statute apart and which, in part at least, led the South Carolina Supreme Court to hold in the case of *Johnson v. Baldwin,* 214 S.C. 545, 53 S.E. 2d 785 (1949), that a statute containing provisions for substituted service upon the Secretary of State, in order to confer jurisdiction over nonresident directors of domestic corporations, could not have retrospective application. In support of its holding the court noted that:

> [a] similar view has uniformly been taken of statutes providing for substituted service upon nonresidents in tort actions growing out of the operation of motor vehicles on the public highway. The courts have uniformly declined to give the statute retroactive effect.
>
> 53 S.E. 2d at 788 [citations omitted.]

As was observed in the annotation at 19 A.L.R. 3d 138, 142,

> [T]his rule rests on the view that neither as a matter of statutory construction nor as a matter of constitutional law is it possible to imply consent retroactively.

From the above, it is clear that § 10-431.2 may not be given retroactive effect. It therefore follows that any service of process upon the defendant under the provisions of such section is invalid.

(b) § 10.2-801, et seq. *Personal Jurisdiction based on conduct.*

Defendant contends that as § 10.2-803 did not become effective until January 1, 1968, and the accident occurred on February 24, 1967, service upon the defendant based upon the commission of a single tortious act under § 10.2-803(1) (c) is ineffective as the statute may not be applied retrospectively. While as noted above, an "Implied Consent" type of statute such as 10.431.2 may not be applied retrospectively, a procedural or jurisdictional statute such as § 10.2-801 *et seq.* does not suffer from the same infirmity.

As was noted in 62 Am. Jur. 2d, *Process* § 80:

> With respect to the question whether a long-arm statute is applicable even though the act or transaction on which jurisdiction is predicated occurred prior to its effective date a *distinction has been made between statutes which provide by their terms merely that the acts or transactions specified therein shall be the basis of the jurisdidction* of local courts over, or extraterritorial service on, nonresidents, *and those enactments, often called "implied consent" statutes,* which by their terms provide that such acts or transactions are deemed to be the consent of the nonresident to the appointment of a local officer as agent for the purpose of service of process. *The general rule that in the absence of a statutory provision to the contrary, statutes pertaining to procedure operate retrospectively, has been applied to the kind of long-arm statutes first de-*

> *scribed. Under this view the retroactive application of such a statute is not precluded by the fact that the act or transaction upon which jurisdiction is predicated occurred prior to the effective date of the statute.* On the other hand, "implied consent" statutes have generally been held not to operate retroactively so as to extend to acts or transactions occurring prior to the effective date of the statute. [Emphasis added.]

Thus, while a principal rule of statutory construction is that statutes are to be construed to operate prospectively unless there is clear legislative intent to the contrary, a principal exception to this rule is that remedial or procedural statutes are generally held to operate retrospectively. (See Annot., 19 A. L. R. 3d 138, 141). In fact, as is noted in 50 Am. Jur., *Statutes* § 482, statutes relating to remedies or modes of procedure do not come within the legal conception of a retrospective law as long as they do not create new rights or take away vested rights. Further authority is found at 82 C. J. S. *Statutes* § 421 where it is stated:

> While it may be said that statutes relating to remedies or procedure may be given a retroactive operation, a statement of the rule perhaps more accurate is that statutes merely affecting the remedy or law of procedure apply to actions begun after their passage, whether the right of action accrued before or after the change in the law, at least in the absence of a constitutional or statutory provision to the contrary.

It is clear in the present case that the plaintiff's cause of action arose prior to the enactment of § 10.2-803 (1) (c) of the South Carolina Code of Laws. It is equally clear that but for her inability to obtain service of process upon the defendant in this state, plaintiff had a remedy at law at that time. We are thus *not faced* with a statute which by its passage created a *new remedy,* but by a statute which merely makes procedurally possible the plaintiff's exercise of her existing rights in the forums of her home state, where the tort occurred, and where undoubtedly the vast majority of the witnesses to the incident may be found. A

case very much on point here in the case of *Walke v. Dallas, Inc.*, 161 S.E. 2d 722, 209 Va. 32 (1968). In *Walke*, the plaintiff was injured while unloading a freight car improperly loaded by a nonresident defendant. The cause of action arose some eight months prior to the effective date of the Virginia long arm statute but the action was not instituted until over a year after the effective date of the statute. The excerpts from the Virginia long arm statute, as cited in the opinion, appear identical to the pertinent portions of the South Carolina statute, although there is no legislative history from which the court can determine if they were in fact the model followed. The reasoning of the court in *Walke* appears clearly applicable here. The court there stated:

> The Virginia long arm statutes are remedial only and do not disturb vested rights or create new obligations; they merely supply a remedy to enforce an existing right. The cause of action here asserted was in being when the statutes were adopted and their only purpose and effect were to give to the courts of this Commonwealth jurisdiction to hear and decide a cause of action of the kind described in the statutes against a nonresident defendant.
>
> We hold that the Virginia long arm statutes, contained in the Code sections referred to, are applicable to causes of action described in § 8-81.2 which arose before as well as those which arise after the enactment of the statute.
>
> *Id.* at 724, 725; *see also*
> *Hoen v. District Court of County of Arapahoe*, 159 Colo. 451, 412 P. 2d 428, 19 A. L. R. 3d 131 (1966)

As the court has been unable to find any South Carolina case construing § 10.2-801 *et seq.* as to whether it may be applied retrospectively, the court must apply South Carolina law as it thinks the South Carolina Supreme Court would declare it if that court were presented with identical facts and issues. *Smith v. Regina Manufacturing*

*Corp.*, 396 F. 2d 826, 828 (4 Cir. 1968). It is the opinion of this court that if faced with a similar case, the South Carolina Supreme Court would follow the clear weight of authority permitting retroactive application of long arm statutes of this type (not implied consent statutes) to cases in which the complaint is *filed after* the effective date of the statute, though the tortious act *occurred before* the effective date.

*Constitutionality of Long Arm Statutes*

Having concluded that personal jurisdiction over defendant was obtained by personal service upon the defendant in Ohio under § 10.2-801, *et seq.*, the court must next consider whether the exercise of personal jurisdiction over the defendant, an Ohio resident, in the District of South Carolina is constitutional. Defendant asserts that he did not have sufficient minimal contacts to satisfy the requirements of due process under the Federal Constitution. The United States Supreme Court in *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) clearly established that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U. S. at 316. As was observed by Judge Wyche in *Shealy v. Challenger Manufacturing Co.*, 198 F. Supp. 151 (D. S. C. 1961), *aff'd* 304 F. 2d 102 (4 Cir. 1962).

> There is no general standard as to what constitutes "sufficient contacts" with the forum and the material factor is the quality and the nature of the corporate activity, rather than mere quantity.
> *Id.* at 153

Subsequently, the Fourth Circuit Court of Appeals, in *Southern Machinery Co. v. Mohasco Industries, Inc.*, 401 F. 2d 374 (4 Cir. 1968) laid down three criteria for determ-

ining the present outer limits of *in personam* jurisdiction based on a single act. These were stated to be:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's acti-ties there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.
>
> *Id.* at 381

While the above cases clearly relate to corporate defendants, the "minimum contacts" test has been held applicable to individuals as well as corporations. See 62 Am. Jur. 2d *Process* § 79 and cases cited therein. An examination of the record in this case clearly establishes that defendant meets all elements of this test in that: (1) he purposefully availed himself of the privilege of acting in the forum state *and* caused a consequence there in that he made use of the Greenville, South Carolina, downtown airport and the propeller of his airplane allegedly injured the plaintiff there; (2) The present cause of action clearly arises from the defendant's activities in that he allegedly was at the controls of the aircraft when the injury occurred; and (3) the interest of the State of South Carolina in providing a forum to one of its citizens, allegedly injured by the defendant in this case, and the fact that the majority of the witnesses are most likely from this state, certainly make the exercise of jurisdiction over the defendant reasonable.

## CONCLUSIONS

In view of the foregoing, this court holds that:

(1) Service of process under § 10-341.2 of the South Carolina Code of Laws was ineffective in that said statute may not be given retroactive effect.

(2) Service of process under § 10.2-801, *et seq.* of the Code of Laws of South Carolina was effective to confer jurisdiction upon this court in that said statute, being procedural in nature and neither creating new rights nor destroying vested rights, may be retroactively applied to causes of action arising before its effective date where the suit was brought after its effective date.

(3) Exercise of personal jurisdiction under § 10.2-801 *et seq.* of the Code of Laws of South Carolina does not, under the facts of this case, violate the due process principles of the Federal Constitution.

The defendant's motion to quash and set aside service of summons and to dismiss this action is denied.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL,
United States District Judge.

Rock Hill, South Carolina,
June 7, 1973.

**OPINION OF THE UNITED STATES COURT OF APPEALS**

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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**No. 73-1903**

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CAROLYN G. HOWARD, APPELLEE,

*versus*

DONALD L. ALLEN, APPELLANT

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**No. 73-1904**

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CAROLYN G. HOWARD, APPELLANT,

*versus*

DONALD L. ALLEN, APPELLEE

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT ROCK HILL.
ROBERT W. HEMPHILL, DISTRICT JUDGE.

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(Argued December 3, 1973. Decided December 13, 1973)
Before BUTZNER and FIELD, Circuit Judges, and TURK District Judge.

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Richard M. Kennedy, Jr. for Carolyn G. Howard; Horace L. Bomar and Donald V. Richardson, III (Robert L. Wynn, III, on brief) for Donald L. Allen.

PER CURIAM:

Because South Carolina's long arm statute, S. C. Code Ann. § 10.2-803 (amended 1972), is a remedial, procedural law, we affirm the ruling of the district court that the statute can be utilized to obtain service of process on a nonresident defendant whose alleged tortious act occurred before the statute was enacted. We accept the district court's assessment that "if faced with a similar case, the South Carolina Supreme Court would follow the clear weight of authority permitting retroactive application of long arm statutes of this type . . . ."

In view of our disposition of this issue, we find it unnecessary to consider the cross assignment of error concerning the application of S. C. Code Ann. § 10-431.1 (Supp. 1971)

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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**No. 73-1903**

---

CAROLYN G. HOWARD, APPELLEE,

*versus*

DONALD L. ALLEN, APPELLANT

---

**No. 73-1904**

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CAROLYN G. HOWARD, APPELLANT,

*versus*

DONALD L. ALLEN, APPELLEE

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**ORDER**

Upon consideration of Donald L. Allen's application to file a petition for rehearing and the petition;

With the concurrence of Judge Field and Judge Turk, It is ADJUDGED and ORDERED that the petition for rehearing is filed and denied.

JOHN D. BUTZNER, JR.
United States Circuit Judge,

IN THE

# Supreme Court of the United States

October Term, 1973

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No. 73-1493

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CAROLYN G. HOWARD, Respondent,

*vs.*

DONALD L. ALLEN, Petitioner.

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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To the United States Court of Appeals for The Fourth Circuit

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KENNEDY & PRICE
By: /s/ RICHARD M. KENNEDY, JR.
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IN THE

# Supreme Court of the United States

October Term, 1973

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No. 73-1493

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CAROLYN G. HOWARD, RESPONDENT,

*versus*

DONALD L. ALLEN, PETITIONER,

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-1493

CAROLYN G. HOWARD, RESPONDENT,

*versus*

DONALD L. ALLEN, PETITIONER,

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Carolyn G. Howard respectfully responds to the Petition for Writ of Certiorari and shows that the Writ should be denied.

1. That there is no substantial federal question involved.

2. That the two reasons for allowance of the Writ presented by appellant do not accurately portray the statutes and cases involved.

(a) The South Carolina "long arm" statute was enacted into law June 2, 1972, as Part Eight, Article Two, Sec. 10.2-803 (1) (C) of the 1962 *Code of Laws of South Carolina.* It made no provisions as to being effective at some future date.

(b) That statute to which appellant makes reference as being effective January 1, 1968 was the South Carolina Uniform Commerical Code as adopted by the legislature in

1966, Title 10.2, *Commercial Code,* Sections, 10.2-101 et seq. This statute affected substantive rights of commercial transactions and the legislature allowed over a year for the act to become effective so that banks and commercial institutions could adjust and prepare for the changes.

(c) It is true that a "long arm" statute was tacked onto the South Carolina Uniform Commercial Code in 1966 but this "long arm" statute was in violation of Section 17 of Article III of the Constitution of the State of South Carolina which requires every act or resolution having the force of law to relate to but one subject and that shall be expressed in the title. One state court and one U.S. District Court ruled that this 1966 "long arm" statute was unconstitutional.

3. That there is no issue of *Erie R. Co. v. Tompkins* in this appeal. The Court correctly applied the statute which was enacted into law June 2, 1972.

4. There is no analogous case in South Carolina which would bear on the issue. The one case, *Johnson v. Baldwin, 214 SC 552, 53 SE 2d 788* involved a "long arm" statute specifically directed to non-resident directors of local corporations. It was on its face prospective only in nature since it allowed a 30-day escape clause. Of more importance, the statute was of the "implied consent" type in that it named the Secretary of State of South Carolina as agent for substituted service upon the non-resident defendant. The Courts have repeatedly held that one cannot "impliedly consent" to the appointment of an agent for service of process "retroactively."

5. Appellant apparently confuses "long arm" statutes of the implied consent type with "long arm" statutes invoking jurisdiction based upon tortious conduct within the state which provide, not for substituted but for personal service direct upon the non-resident within his home state.

Those cases cited by appellant alleging a conflict among

Courts all involve statutes of the "implied consent" type which provide for service upon the Secretary of State or Director of Motor Vehicles as the agent for the non-resident.

## CONCLUSION

The South Carolina "long arm" statute provides for personal service upon a non-resident defendant. No provision is made for substituted service upon some state official within South Carolina.

Jurisdiction is based upon tortious conduct committed within the forum state. The statute is curative in nature and its purpose is to cure past errors and omissions and by nature is retrospective in its application. SEGARS V. GOMEZ, D.C.S.C., Appendix, page 36.

This "long arm" statute of South Carolina cannot be compared as urged by the appellant, with those statutes and cases cited in the petition wherein a state achieves jurisdiction over a non-resident by the mere act of operating a motor vehicle, piloting a ship, or acting as a non-resident director of a local corporation. According to those statutes these acts constitute the appointment by the non-resident of some state official as his agent for the service of process.

Appellee respectfully submits that the Petition to grant a Writ of Certiorari to review the validity of the lower Court's affirmation of jurisdiction should be denied.

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